

**UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA**

CITY OF HURRICANE, WEST VIRGINIA;
and THE COUNTY COMMISSION OF
PUTNAM COUNTY, WEST VIRGINIA,

Plaintiffs,

v.

DISPOSAL SERVICE, INCORPORATED, a
West Virginia Corporation; and WASTE
MANAGEMENT OF WEST VIRGINIA,
INCORPORATED, a Delaware Corporation,

Defendants

Case No. 3:14-15850

**COMPLAINT FOR JUDICIAL ABATEMENT OF AN IMMINENT
AND SUBSTANTIAL ENDANGERMENT TO HEALTH AND THE
ENVIRONMENT AND FOR INJUNCTIVE RELIEF TO ABATE A PUBLIC
NUISANCE UNDER STATE AND MUNICIPAL LAW**

Plaintiffs herein are the City of Hurricane, West Virginia, a West Virginia Municipality with “Home Rule” authority pursuant to Article 6-39a of the Constitution of the State of West Virginia, and the County Commission of Putnam County, West Virginia, the governing body of a political subdivision of the State of West Virginia established pursuant to Article IX of the Constitution of the State of West Virginia (hereinafter collectively: “Governmental Plaintiffs”). Both Governmental Plaintiffs by and through their undersigned counsel, make the following allegations upon knowledge as to themselves and upon information and belief as to all other matters:

Nature of this Case

1. Governmental Plaintiffs bring this action to abate a serious public nuisance condition and endangerment to human health and the environment within the City of Hurricane

("the City") and Putnam County ("the County"), West Virginia. This public nuisance condition, which is the result of the improper and unlawful disposal of hazardous and toxic substances at the landfill ("DSI Landfill") owned and operated by Defendants Disposal Service, Inc., and also operated by Waste Management of West Virginia, Inc. Conditions at the DSI Landfill, located in Hurricane and Putnam County, are jeopardizing the public health, safety, welfare and environment of both the City and the County and are threatening the public's safe and comfortable use and enjoyment of public and natural resources within the City and the County, all to the detriment of the inhabitants and taxpayers of both Hurricane and Putnam County.

2. In full communication, cooperation, and coordination with each other, and only after advance notice to Defendant of the precise allegations and specific claims set forth in this Complaint, the City and the Putnam County Commission ("the Commission") bring this action to protect public health, safety, welfare and the environment within the City and the County from public nuisance and endangerment conditions resulting, in whole or in part, from the handling and disposal of "solid wastes" and "hazardous wastes," as those terms are defined by and used in the federal Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act of 1976 ("RCRA" or "federal Hazardous Waste Management Act"), as amended, 42 U.S.C. §§ 6901-6992k.

3. The Governmental Plaintiffs, through the claims asserted herein, seek relief requiring, *inter alia*, that Defendants: (a) perform or cause to be performed, under the oversight and supervision of Governmental Plaintiffs, a remedial investigation and abatement of the actual and potential endangerments described herein in full compliance with the National Oil and Hazardous Substances Pollution Contingency Plan ("NCP"), 40 C.F.R., Part 300, pursuant to RCRA§ 7002(a)(1)(A) and § 7002(a)(1)(B), 42 U.S.C. § 6972(a)(1)(A) and § 6972(a)(1)(B); (b)

abate the public nuisance described herein, in full compliance with the NCP, pursuant to state and federal law; and (c) reimburse Plaintiffs for their reasonable litigation costs, including reasonable attorneys' fees and expert witness fees and costs incurred and to be incurred in this action pursuant to RCRA § 7002(e), 42 U.S.C. § 6972(e).

Jurisdiction, Venue, and Notice

4. This Court has jurisdiction over the subject matter of the Plaintiffs' First Cause of Action pursuant to Section 7002(a) of RCRA, 42 U.S.C. § 6972(a) and 28 U.S.C. § 1331.

5. This Court has supplemental jurisdiction under 28 U.S.C. § 1367 over the Second Cause of Action (asserted by both Plaintiffs) and the Third Cause of Action (asserted solely by the City) because those claims are so related to the federal claim in this action that they form the same case and controversy under Article III of the U.S. Constitution.

6. Venue is proper in this Court pursuant to RCRA § 7002(a), 42 U.S.C. § 6972(a), and 28 U.S.C. § 1391(b) because the actual and threatened endangerment, injury and damage at issue are taking place and have taken place in this district.

7. The City and the Commission, in their Notice of Endangerment (a copy of which is attached hereto as Exhibit A and incorporated herein by reference) provided notice of the actual and threatened endangerment, injury and damage alleged herein to: (a) the Administrator of the United States Environmental Protection Agency ("U.S. EPA") and the Regional Administrator for U.S. EPA's Region Three; (b) the State of West Virginia, including the Director of the Department of Environmental Protection ("WVDEP") and the Director of WVDEP's Division of Water and Waste Management; and (c) the Defendants, including Defendants' registered agents and their manager at the DSI Landfill.

8. The City and the Commission have satisfied all jurisdictional prerequisites to filing this Complaint.

The Parties

9. Plaintiff the City of Hurricane is an incorporated municipality located in Putnam County, West Virginia, with authority pursuant to W.Va. Code § 8-12-1 to sue and be sued “in any court.”

10. Plaintiff, the County Commission of Putnam County, West Virginia, is a governing body and public corporation existing under Article IX, § 9 of the Constitution of West Virginia and W.Va. Code §§ 7-1-1, *et seq.*, with the authority to, among other things, sue and plead (W.Va. Code § 7-1-1), and the duty to, among other things, superintend and administer the internal police and fiscal affairs of Putnam County (W.Va. Code § 7-1-3), and act generally in the best interests of the citizens of Putnam County. The Commission seeks the relief herein pursuant to the authority granted to it under Section 16-3-6 to seek an injunction to restrain, prevent or abate any nuisance affecting public health.

11. Defendant Disposal Service, Incorporated (“DSI”) is a West Virginia corporation with its principal place of business in West Virginia. DSI is the owner of the DSI Landfill and is an operator of that landfill.

12. Waste Management of West Virginia, Inc. (“WMWV”) is a Delaware corporation with its principal place of business in the State of Texas. On information and belief, WMWV is an operator of the DSI Landfill and makes or controls the resolution of all relevant decisions pertaining to the operation of the DSI Landfill, including decisions on which wastes are to be disposed at the landfill and the manner in which such wastes are to be handled.

The Release of Toxic Chemicals from the Freedom Industries Location

13. On or about January 9, 2014, a large quantity of toxic chemicals publicly estimated to be in the range of ten thousand (10,000) gallons was spilled from aboveground storage tank located on property (“the Freedom Property”) owned and/or operated by Freedom Industries, Inc., in Charleston, Kanawha County, West Virginia, immediately adjacent to and bordered by the Elk River. The aboveground storage tank contained, and the spilled material consisted of: (a) a commercial chemical product manufactured by Eastman Chemical Company and known by the trade name “Crude MCHM;” (b) a second commercial chemical product, manufactured by Dow Chemical Company, and known as propylene glycol phenyl ether or “PPH;” and (c) a third commercial chemical product, known as dipropylene glycol phenyl ether or “DiPPH.”

14. According to data disclosed by the manufacturer in the relevant Material Safety Data Sheets (“hereinafter: “MSDS”), Crude MCHM is a chemical mixture containing the commercial chemical product “methanol” (assigned number 67-56-1 by the Chemical Abstracts Service division of the American Chemical Society).

15. Pursuant to final regulations promulgated by the U.S. Environmental Protection Agency, methanol is listed as a “hazardous waste listed and identified by the Administrator” under subtitle C of RCRA, 42 U.S.C. 6921 *et seq.* (*see* 40 C.F.R. § 261.33).

16. Pursuant to final regulations promulgated by the U.S. Environmental Protection Agency, “methanol” is listed as a “hazardous substance” under Section 102(a) of the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA” or federal “Superfund Act”), 42 U.S.C. § 9602(a) (*see* 40 C.F.R. § 302.4).

17. Crude MCHM, PPH, and DiPPH are toxic chemicals that are harmful to human health, though the extent to which they are harmful is not fully appreciated.

18. An estimated 10,000 gallons of the hazardous and toxic mixture spilled from the Freedom Industries, Inc. site quickly reached the Elk River, which runs northwest of and immediately adjacent to the Freedom Property. The spilled toxic mixture entered the Elk River approximately 1.5 miles upstream of the public water system intake for West Virginia American Water, the supplier of potable drinking water to hundreds of thousands of customers in northwest West Virginia, resulting in the distribution of contaminated water to consumers. As a consequence of this spill and the resulting threat to human health, approximately 300,000 residents within nine (9) counties were quickly without potable water for drinking, bathing, and cooking.

19. Individuals in the vicinity of the spill at the Freedom Property and individuals receiving tainted water in their homes and at their places of work complained of a noxious licorice-like odor, nausea, and vomiting.

20. On or about January 9, 2014, West Virginia-American Water Company announced publicly that water which it had distributed and which was intended for potable consumption from its facility in Charleston had become contaminated by the spill from the Freedom Industries, Inc., site.

21. On the same date, West Virginia Governor Earl Ray Tomblin, recognizing a clear endangerment to human health, declared a State of Emergency for the nine West Virginia counties in which consumers of West Virginia-American Water were located (Kanawha, Putnam, Cabell, Boone, Clay, Jackson, Logan, Lincoln, and Roane), and residents of the affected area were advised not to drink, bathe, or wash with water from West Virginia American Water Company. The contamination thus forced the closure of schools, businesses, restaurants, bars, hotels, and government buildings, compelled hospitals and nursing homes to curtail operations or

to obtain alternative supplies of potable water, and caused the loss of substantial revenue to the West Virginia economy.

22. On or about January 10, 2014, the President of the United States declared a federal emergency for the affected areas of West Virginia in response to the spill event.

23. Although in late January the State of West Virginia eventually advised the public that consumption of water distributed by West Virginia-American Water could resume, the U.S. Centers for Disease Control and Prevention ("CDC") advised that pregnant women should not consume it.

24. Due to the uncertainty and lack of information regarding the health and environmental consequences of exposures to Crude MCHM and PPH, CDC reported "screening levels" of 1 ppm for Crude MCHM and 1.2 ppm for PPH. Thereafter, Governor Tomblin, in discharge of his Constitutional authority to protect the public and public health in times of emergency established a safe drinking water maximum contaminant level at 10 parts per billion ("ppb") for Crude MCHM.

25. It was not until February 28, 2014 that the Governor of West Virginia lifted the State of Emergency declaration.

26. On or about March 3, 2014, CDC advised that pregnant women could resume drinking water distributed by West Virginia-American Water.

The Hazardous and Toxic Nature of the Spilled Contaminants

The State's Efforts to Evaluate the Released Contaminants

27. The West Virginia Bureau for Public Health established the West Virginia Testing Assessment Project ("WV TAP") in February 2014 to initiate an in-depth analysis to determine the odor threshold for Crude MCHM, to begin assessing tap water in homes in the

affected areas, and to establish a panel of independent experts to evaluate the safety factor for the chemicals spilled by Freedom Industries.

28. On or about March 17, 2014, WV TAP released a report entitled "Health Effects for Chemicals in 2014 West Virginia Chemical Release: Crude MCHM Compounds, PPH and DiPPH," stating that "the exact chemical composition of the spilled liquid" from Freedom Industries "remains somewhat undefined" and that the "exact composition" makeup of the chemicals "has not been chemically confirmed."

29. WV TAP explained in its report that Crude MCHM contains a mixture of six organic compounds, MCHM, MMCHM, MMCHC, DMCHDC, CHDM and Methanol, but that it has been reported by Freedom Industries that in addition to Crude MCHM, the leaked liquid also contained PPH Glycol Ether (PPH) and DiPPH.

30. WV TAP's report explained that "[v]ery limited toxicological data has been reported for Crude MCHM or pure MCHM[.]"

31. WV TAP reported that the United States Environmental Protection Agency has developed a national system providing toxicity information to the public but that it lists absolutely no toxicology data for Crude MCHM, MCHM, MMCHM, MMCHC, PPH, DiPPH and Polypropylene glycol phenyl ether.

32. WV TAP noted that the USEPA list of maximum contaminant levels for drinking water does not include any level with regard to the known chemical ingredients of Crude MCHM or PPH.

33. WV TAP also issued a "Technical Memorandum" on a short study conducted regarding the odor threshold concentration and recognition level of people with regard to Crude MCHM in water.

34. The study indicated that humans' could detect the odor of Crude MCHM when it was lower than analytical reports could detect. The study also indicated that because of the odor, people objected to consuming the water.

35. A report published earlier this month and titled "Elk River Chemical Spill Health Effects / Findings of Emergency Department Record Review" (attached hereto as Exh. B), the West Virginia Bureau for Public Health ("WVBPH") and the Agency for Toxic Substances Disease Registry ("ATSDR"), contained the agencies' observations following their review of emergency room records from local hospitals. The agencies reported that at least 369 persons sought and obtained treatment at Charleston-area emergency rooms for symptoms associated with MCHM exposure. Of these persons, 13 individuals—typically persons who as a consequence of chronic diseases were particularly vulnerable—were admitted to the hospital for treatment.

36. WVBPH and ATSDR also reported their conclusions concerning Crude MCHM, PPH, and their effects on human health. The agencies observed as follows:

Exposure to liquid MCHM can cause skin and eye irritation, vomiting, and diarrhea. MCHM vapors in the air can also irritate the eyes, nose, throat, and lungs. When laboratory animals are exposed at high doses, MCHM has been shown to cause problems with the liver, kidneys, blood, and the brain.

* * *

Health effects of PPH are similar to those caused by MCHM.

(Exhibit B)

37. The West Virginia Department of Health and Human Resources has provided higher estimates: that at least 26 people were admitted to area hospitals and 533 were treated and released at those facilities for symptoms related to Crude MCHM exposure. The Executive Director of the West Virginia Department of Health recently stated that "Those [numbers] are probably gross underestimates of the true public health impacts."

38. According to recent estimates by WV TAP over 100,000 people experienced skin reactions, eye irritation, nausea or other ailments after exposure to Crude MCHM.

The Manufacturer Has Acknowledged the Hazardous Nature of the Contaminants

39. Eastman Chemical Company ("Eastman"), the manufacturer and supplier of Crude MCHM, formally advises with regard to Crude MCHM: "Avoid release to the environment." Eastman also advises that the method for containment and cleaning up of MCHM is to "[a]bsorb the spill with vermiculite or other inert material, then place in a container for chemical waste." For large spillages, Eastman advises "Flush spill area with water spray, Prevent runoff from entering drains, sewers, or streams, Dike for later disposal"

40. **The manufacturer's recommended disposal method for Crude MCHM is incineration. The relevant MSDS from Eastman Chemical Company instructs as follows: "Mix with compatible chemical which is less flammable and incinerate."**

41. As to the toxicity of Crude MCHM to fish, aquatic invertebrates and aquatic plants, Eastman reports that there are "[n]o data available."

All Relevant Statutory and Regulatory Schemes Recognize the Toxic
And Hazardous Character of the Crude MCHM Wastes and Residues

*Crude MCHM Wastes and Residues are a Hazardous Waste Under the Statutory and
Regulatory Schemes of Both RCRA and the West Virginia Hazardous Waste Disposal Act*

42. The federal Resource Conservation and Recovery Act ("RCRA") was enacted by Congress in 1976, as an amendment to the 1965 Solid Waste Disposal Act. Subtitle C of RCRA establishes a national, comprehensive "cradle to grave" management system for substances determined to be hazardous wastes, regulating, *inter alia*, the manner in which such wastes can be treated, stored, and disposed of. See 42 U.S.C. §§ 6921-6934. Under RCRA § 3006(b), 42 U.S.C. § 6926(b), a state may develop its own hazardous waste program and, following notice

and an opportunity for public hearing, apply for and obtain U.S. EPA approval for such program to operate “in lieu of the federal program within such state”, subject to certain federal requirements, the most notable of which is that the state program must be equivalent to and consistent with the federal RCRA Subtitle C hazardous waste management program. *See* 42 U.S.C. § 6926(b). West Virginia’s hazardous waste program, which is substantially similar to the federal program, has been formally approved by the Administrator of the U.S. Environmental Protection Agency and, accordingly, operates “in lieu of” the federal RCRA program within the State of West Virginia. *See* 51 FR 17739B (May 15, 1986); 65 FR 29973 (May 10, 2000); 78 FR 70225 (November 25, 2013).

43. Virtually identical to the Congressional definition set forth in RCRA § 1004(5), 42 U.S.C. § 9604(5), the West Virginia Hazardous Waste Management Act (hereinafter: “WV HWMA”) defines the term “hazardous waste” to mean:

[A] waste or combination of wastes, which because of its quantity, concentration or physical, chemical or infectious characteristics, **may**:

(A) Cause, or significantly contribute to, an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness; **or**

(B) pose a substantial **present or potential hazard** to human health or the environment when improperly treated, stored, transported, disposed of or otherwise managed.

West Virginia Code § 22-18-3(6) (emphasis added). This language is the operative definition of “hazardous waste” throughout both statutes.

44. As a consequence of its recognized toxicity and its patently hazardous nature as to human health and the environment, Crude MCHM and the MCHM Wastes and Residues plainly meet the foregoing statutory definition and are “hazardous wastes” for the purposes of both RCRA and WVHWA. Indeed, the risk of harm to human health resulting from the release of Crude MCHM into the environment already has shut off the water supply to nine West Virginia

counties for two weeks or more, has caused physical harm to over 100,000 individuals, has shut down businesses, schools, hospitals, nursing homes, and hospitality establishments, and has caused enormous personal suffering and inconvenience and significant losses to the state's economy.

45. Section 22-18-6 of the West Virginia Code provides that the Director of the West Virginia Department of Environmental Protection is responsible for promulgating, in consultation with other state agencies, rules

establishing criteria for identifying the characteristics of hazardous waste, identifying the characteristics of hazardous waste and listing particular hazardous wastes which are subject to the provisions [of the West Virginia Hazardous Waste Management Act].

West Virginia Code § 22-18-6(a)(2). Similarly, under RCRA, Congress directed that the Administrator of the U.S. EPA was to develop and promulgate criteria for identifying the characteristics of hazardous wastes and for the listing of hazardous wastes which were to be subject to the Congressionally created strict regulatory program of RCRA Subtitle C. *See* 42 U.S.C. § 6921. In both cases, the legislative bodies directed that the administrative agency define and describe a *subset* of all the substances that meet the statutory definition of "hazardous waste" which those administrative agencies determine should be subject to the strict, legislatively-defined regulatory program applicable to the transportation, treatment, storage, and disposal of such regulatory hazardous wastes. In the federal RCRA scheme, Congress refers to this administratively defined subset of hazardous wastes as "hazardous waste identified or listed under this subchapter" (*i.e.*, RCRA Subtitle C), *see, e.g.*, 42 U.S.C. § 6922(a). In the scheme of WVHWMA, this subset of wastes is referred to as "hazardous waste identified or listed under this article," *see, e.g.*, West Virginia Code § 22-18-6(a)(3). Where in the many instances either statute refers simply to "hazardous wastes," each refers directly to the broader set of wastes

meeting the governing statutory definition of that term. *See* Adam Babich, “RCRA Imminent Hazard Authority: A Powerful Tool for Businesses, Governments, and Citizen Enforcers,” 24 ELR 10122 (1994). In order for the narrower “subset” definition to apply to a waste, that waste must first meet the broader “hazardous waste” definition set by statute and outlined above.

46. In order to delineate the subset of Hazardous Wastes that the Director determined should be subject to the strict regulatory program under WVHWMA (“regulatory hazardous wastes”), the Director of the West Virginia Department of Environmental Protection adopted and incorporated, with certain exceptions not herein relevant, applicable federal regulations from Subtitle C of RCRA pertinent to the listing and identification of “hazardous wastes listed and identified by the Administrator” for purposes of the federal regulatory (*i.e.*, Subtitle C”) program. *See* West Virginia Code of State Regulations § 33-20-3 (adopting and incorporating the hazardous waste identification and listing regulations of 40 C.F.R. Part 261, with certain modifications, exceptions and additions).

47. Included within the federal regulations adopted and incorporated into the West Virginia hazardous waste management program is the designation of the commercial chemical product “methanol”, a key component of the Crude MCHM mixture, as a “listed” regulatory hazardous waste under 40 C.F.R. § 261.33 and its West Virginia counterpart, when that commercial chemical product is discarded (specifically including spilled or leaked) or intended to be discarded.

48. Both the federal RCRA Subtitle C program and the West Virginia Hazardous Waste Management program provide for the identification of regulatory hazardous wastes by characteristic, including the characteristic of toxicity, which is determined by application of a designated testing protocol set forth in 40 C.F.R. § 261.24 (adopted by reference into the West

Virginia Hazardous Waste Management program by Section 33-20-3 of the West Virginia Code of State Regulations).

49. With certain exceptions not herein applicable, 40 C.F.R. § 261.24 provides that a waste exhibits the characteristic of toxicity and is thus a “hazardous waste listed and identified by the Administrator” under RCRA Subtitle C, and a regulated Hazardous Waste under the West Virginia Hazardous Waste Management Act if (using the Toxicity Characteristic Leaching Procedure, test Method 1311 in “Test Methods for Evaluating Solid Waste, Physical/Chemical Methods,” EPA Publication SW-846) the extract from a representative sample of the waste contains any of the contaminants listed in the table in that section at the concentration equal to or greater than the respective value given in that table.

50. In the case of organic chemicals (like MCMH), each of the section 261.24 toxicity table values was derived from a known toxicity level, deemed necessary and appropriate to the protection of public health under another regulatory scheme, typically the federal Safe Drinking Water Act (“SDWA”), 42 U.S.C. §§ 300f – 300j(26). *See* 55 FR 11798 (March 29, 1990). While RCRA is Congress’s most comprehensive effort to protect public health and the environment by addressing land pollution through the regulation of solid and hazardous wastes, the SDWA contains Congress’s effort to protect the public health through a strict and enforceable “end-of-the drinking water pipe” standards for the nation’s public drinking water supply. The SDWA accomplishes this goal by setting safe, enforceable contaminant concentration values—known as maximum contaminant levels or “MCLs”—for contaminants known to pose health risks when present in drinking water.

51. To derive the 40 CFR § 261.24 toxicity table values (which set toxicity thresholds for RCRA regulatory hazardous waste determinations) in order to protect the nation’s

groundwater from toxic material leaching out of land disposal units, U.S. EPA multiplies the relevant toxicity value (typically the MCL under SDWA) for an organic chemical by a dilution/attenuation factor (“DAF”), which is typically 100 for allowable drinking water levels. *See* 55 FR 11798 (the DAF “estimates the dilution and attenuation of the toxic constituents in a waste as they travel through the subsurface from the point of leachate generation (i.e., the landfill) to the point of human or environmental exposure.”) Thus, for each MCL set pursuant to SDWA to protect against health threat in a public water supply, a corresponding TCLP value has been derived as a product of the MCL and the DAF for purposes of protecting the nation’s groundwater from those same health threats via leachate from a landfill or land disposal unit.

52. Although no MCL has been set under the SDWA for either “Crude MCHM” or PPH, the Governor of West Virginia, exercising emergency executive authority in the face of the health and environmental emergency then confronting a large portion of the State, set an emergency screening level and a provisional MCL of 10 parts per billion (10 ppb) for MCHM in the state’s drinking water. Accordingly, *for Crude MCHM*, a corresponding emergency or provisional TCLP threshold of 1 part per million (1 ppm) should also be recognized for the purpose of determining whether a substance when it becomes a waste under the West Virginia Hazardous Waste Regulations is a regulatory hazardous waste for the purposes of those same regulations, at least in the context of this State & Federal Emergency until U.S. EPA or the WV Department of Environmental Protection establishes a different standard through the rule-making process.

53. On information and belief, the Crude MCHM Wastes and Residues which Defendants accepted and disposed of at the DSI landfill in Hurricane, West Virginia, contained MCHM at concentrations well in excess of 1 ppm. Accordingly, the Crude MCHM Wastes and

Residues are and should be considered hazardous wastes, both in the context of the statutory definitions outlined above and in the context of the “listed and identified” hazardous wastes subject to the applicable state and federal regulatory schemes.

The Crude MCHM Wastes and Residues are “Hazardous Substances” Under the Federal Comprehensive Environmental Response, Compensation, and Liability Act

54. The federal Comprehensive Environmental Response, Compensation & Liability Act (“CERCLA” or “federal Superfund Act”) (42 U.S.C. § 9601-- 9675) provides a comprehensive mechanism and a statutory and regulatory framework to direct governmental entities and private parties responding to the release of hazardous substances into the environment and provides guidance, cleanup criteria, and controls for such remedial activities.

55. In CERCLA Section 102(a), 42 U.S.C. § 9602(a), Congress directed the Administrator of the U.S. Environmental Protection Agency to designate “as hazardous substances . . . such elements, compounds, mixtures, solutions, and substances which, when released into the environment may present substantial danger to the public health or welfare or the environment.” 42 U.S.C. § 9602(a). The Administrator’s designations are set forth at 40 C.F.R. § 302.4, in which the substance “methanol” is listed. As noted above, methanol is a component of Crude MCHM.

56. Federal courts have recognized that where a waste material contains a designated hazardous substance, like methanol, then the entirety of that waste material is itself a hazardous substance for the purposes of CERCLA. *See, e.g., State of Arizona and the City of Phoenix v. Motorola, Inc.*, 774 F. Supp. 566 (D. AZ, 1991) *United States v. Carolawn*, 21 Env’t Rep. Cases 2124, 2126 (D.S.C. 1984). Accordingly, the Crude MCHM waste released from the Freedom Industries site—a substance which contains a CERCLA hazardous substance— site and the soils

and waters contaminated with it are undeniably a “Hazardous Substance” within the meaning of CERCLA § 101(14), 42 U.S.C. § 9601(14).

***The Elk River Spill Event Constituted a Hazardous Waste /
Hazardous Substance Emergency Under West Virginia Law***

57. In order to provide funds to address the release of hazardous wastes and hazardous substances in emergency circumstances, such as those presented by the spill from the Freedom Industries site, the West Virginia Legislature established the West Virginia Hazardous Waste Emergency Response Fund (“the Fund”). (W. Va. Code Art. 22-19) The Fund provides resources for the purpose of responding to emergencies arising from releases into the environment of hazardous waste and hazardous substance, such as the one which occurred in January at the Freedom Industries location. The legislation establishing this Emergency Fund not only highlights the West Virginia Legislature’s recognition of the importance of the interplay between RCRA and CERCLA in appropriately responding to the release of hazardous wastes and hazardous substances, it also expresses a legislative view that such releases do constitute a genuine emergency and call for a prompt and well-considered response in order to protect public health and the environment.

***Notwithstanding the Patently Hazardous Nature of the MCHM Wastes and Residues and
The Recognized Endangerments Associated with Human Exposure to Such Wastes and
Residues, Spill Wastes and Residues Containing Crude MCHM, PPH, and DiPPH,
Were Disposed of at the DSI Landfill, Without Plaintiffs’ Knowledge or Consent***

58. Beginning in January 2014, cleanup efforts were undertaken to remove both spilled/discarded Crude MCHM and soil and groundwater that had been contaminated with Crude MCHM, PPH and DiPPH (hereinafter collectively, “the Crude MCHM Waste and Residue”) from the Freedom Industries facility in Charleston, Kanawha County, West Virginia. On information and belief, the Crude MCHM Waste and Residue were removed from the

Freedom Industries location and taken offsite to an interim location, where such wastes were stored for some period of time.

59. On or about March 12, 2014, the Governmental Plaintiffs learned of and received complaints from residents of a powerful and noxious odor, emanating from the DSI Landfill. The odor reports both Governmental Plaintiffs received were consistent with odors reported by individuals in the vicinity of the Freedom Property following the January 2014 spill and odors reported by those who had received tainted potable water from West Virginia American Water during the same period.

60. Through their investigation of the complaints from the public concerning the odor, both Governmental Plaintiffs discovered that Crude MCHM Waste and Residue from the Freedom Industries, Inc. spill site was being transported from an off-site storage location through Putnam County and the City of Hurricane to DSI's solid waste landfill.

61. Defendants never notified either Governmental Plaintiff or the general public of their intent to accept MCHM Waste at the DSI Landfill. Nor did Defendants provide any public notice or opportunity to comment as to their application to the West Virginia Department of Environmental Protection to modify their operating permit to allow acceptance of Crude MCHM Waste and Residue.

62. DSI and WMWV have admitted that they have accepted at least nine (9) truckloads of MCHM Waste, including "cleanup water" tainted with Crude MCHM, for disposal at the DSI Landfill. DSI and WMWV admitted that eight of the at least nine truckloads arrived at the DSI Landfill in liquid form, were placed into a concrete-lined pit, and was then "solidified" by mixing it with sawdust by use of a backhoe. The other truckload arrived at the landfill in an already "solidified," form, having been treated by a third party in an undetermined

manner. According to DSI and WMWV, this toxic “solidified” mixture was then “mixed in with the general waste mass at various locations of the landfill.”

63. DSI and WMWV have also admitted that efforts were made to dilute the Crude MCHM Waste and Residue in a futile effort to abate or mitigate its toxic effects.

The MCHM Wastes and Residues are Incompatible with the DSI Landfill

64. The DSI solid waste landfill is open to the environmental elements. It rains in Putnam County, and such rain often mixes with landfill contents. There are other various liquids in a landfill that will mix with solidified substances in the landfill.

65. The leachate collected from DSI's landfill eventually makes it way via a leachate collection system, and from there to **a surface leachate collection pond which passes the collected leachate to an aeration unit** before the “treated” leachate is then sent to the wastewater treatment facility of Plaintiff, City of Hurricane. Eventually, the wastewater at said Plaintiff's Publicly Owned Treatment Works (“POTW” or “wastewater treatment facility”) is discharged into Hurricane Creek, surface waters of the State of West Virginia.

66. Indeed, the very design and construction of the DSI Landfill make it unsuited for the disposal of the MCHM Wastes and Residues. Within the DSI Landfill, leachate is collected and directed toward an open pond, where it is aerated, as a form of “pretreatment,” before it is sent to the City of Hurricane POTW. While such aeration may be a suitable pretreatment method for many solid wastes, it is an entirely unsuited pretreatment method for the MCHM Wastes and Residues, which due to their volatile, odorous, and noxious nature, are likely to pollute the surrounding community with noxious and harmful fumes, further endangering public health, welfare, and the environment.

67. On information and belief, the Crude MCHM Wastes and Residues which Defendants accepted and disposed of at the DSI landfill in Hurricane, West Virginia, contained MCHM at concentrations well in excess of 1 ppm. Accordingly, for the purposes of West Virginia hazardous waste regulation, the Crude MCHM Waste and Residue were, in the context of the Declared Public Emergency during which those wastes were generated, necessarily a provisional hazardous wastes regulated pursuant to Article 22-11 of the West Virginia Code, and should have been treated, stored, and disposed of in a manner required as to all hazardous wastes regulated under Article 22-18 of the West Virginia Code.

68. The DSI Landfill is not a facility which was designed, engineered, or constructed to accept RCRA Subtitle C hazardous wastes or highly toxic wastes such as the Crude MCHM Waste and Residue for disposal. On information and belief, the Defendant owners and operators of the DSI Landfill have not satisfied any of the conditions necessary for the DSI Landfill to become licensed to accept any RCRA Subtitle C hazardous waste.

69. The DSI Landfill is, at a minimum, very poorly suited as a disposal site for hazardous and toxic waste materials, including the MCHM Wastes and Residues, and the decision to place such wastes into that landfill was grossly ill-considered, at best.

70. The cleanup and removal of MCHM Wastes and Residues from the Freedom Industries site falls squarely within the definition of "remedial action," under section 101(25) of CERCLA, 42 U.S.C. § 9601(25), since such activities involved the cleanup of a CERCLA hazardous substance that had been released into the environment; namely Crude MCHM that had been released from the Freedom Industries location in Charleston.

71. In Section 121(b) of CERCLA, 42 U.S.C. § 9621(b), Congress, in order to assure adequate protection of public health, welfare, and the environment, established national rules and

standards applicable to remedial actions undertaken in response to “Hazardous Substances” released into the environment, such as the cleanup of released Crude MCHM at the Freedom Industries site,. In that same section, Congress clearly directed that in the context of a remedial action in response to a “Hazardous Substance” that has been released into the environment, the offsite transport and disposal of released hazardous substances or contaminated materials without treatment to permanently and significantly reduce the volume, toxicity or mobility of the hazardous substances should be *the least favored alternative* remedial action where practicable treatment technologies are available. *See* 42 U.S.C. § 9621(b). This direction, put in place to reflect a Congressional determination of measures necessary adequately to protect public health and the environment, is entirely consistent with Congress’s express objective, in enacting RCRA, to “minimize[e] . . . the land disposal of hazardous waste.” RCRA § 1002(a)(6), 42 U.S.C. § 6902(a)(6). Stated differently, Congress plainly recognized that transporting untreated hazardous substances for placement into a landfill is to be avoided, unless there are no other alternatives. (This would be particularly true where a landfill in question is not designed, engineered, or licensed to accept toxic or hazardous wastes, as is the case with the DSI Landfill.)

72. On information and belief, Defendants, knowing that the Crude MCHM Wastes resulted from a remedial action in response to the release of those chemicals into the environment, never considered or evaluated feasible methods of treatment to permanently and significantly reduce the volume, toxicity or mobility of the Crude MCHM Wastes and Residues.

73. On information and belief, prior to accepting the Crude MCHM Wastes and Residues at the DSI Landfill, Defendants never considered or evaluated feasible alternatives to the transport and land disposal of the Crude MCHM Wastes and Residues, including alternatives

which were ultimately selected for those wastes after disposal at the DSI Landfill was discontinued.

COUNT I
ABATEMENT OF A CONDITION WHICH MAY PRESENT AN IMMINENT AND
SUBSTANTIAL ENDANGERMENT TO HEALTH AND THE ENVIRONMENT
PURSUANT TO RCRA § 7002(a)(1)(B)
(Asserted by Both Governmental Plaintiffs Against Both Defendants)

74. Plaintiffs incorporate paragraphs 1 through 73, above, as if fully set forth herein.

75. Section 7002(a)(1)(B) of RCRA, 42 U.S.C. § 6972(a)(1)(B), under which Plaintiffs bring this count, is RCRA's citizen enforcement provision. Section 7002(a)(1)(B) authorizes "any person" to seek redress in federal court for potential risks posed to public health and the environment by "hazardous wastes" and "solid wastes." The gravamen of a Section 7002(a)(1)(B) claim is a potential endangerment to health or environment rather than a statutory violation.

76. Any person may bring a lawsuit under RCRA § 7002(a)(1)(B) when: (a) a "solid or hazardous waste" (b) "may present an imminent and substantial endangerment to health or the environment" and (c) the defendant falls within one of the categories of entities that Congress declared liable for taking abatement action or "such other action as [this Court determines] may be necessary."

77. The persons declared liable by Congress for abatement of potential endangerments under RCRA § 7002(a)(1)(B) are entities that contributed to "past or present handling, storage, treatment, transportation, or disposal" of the "hazardous wastes" and "solid wastes" at issue. Pursuant to the express terms of RCRA § 7002(a)(1)(B), these entities specifically include "any past or present generator, past or present transporter, or past or present owner or operator of a treatment, storage, or disposal facility."

78. Under RCRA § 1004(27), 42 U.S.C. § 6903(27), "solid waste" is "discarded material, including solid, liquid, semisolid, or contained gaseous material resulting from industrial, commercial, mining, and agricultural operations, and from community activities."

79. Under Section 1004(5) of RCRA, 42 U.S.C. § 6903(5), "hazardous waste" is "a solid waste, or combination of solid wastes, which because of its quantity, concentration, or physical, chemical, or infectious characteristics may . . . pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported or disposed of, or otherwise managed."

80. Under Section 1004(3) of RCRA, 42 U.S.C. § 6903(3), "disposal" means "the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or water so that such solid waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground waters."

81. Governmental Plaintiffs and both Defendants are each a "person" within the meaning of RCRA § 1004(15), 42 U.S.C. § 6903(15).

82. The MCHM Wastes are solid wastes because, in the context of the toxic contamination at and emanating from the DSI Landfill, they are discarded materials resulting from industrial and commercial operations and because Freedom Industries, Inc., the source of the Crude MCHM releases, is an industrial or commercial source.

83. The "solid wastes" Crude MCHM Waste and Residue, are "hazardous wastes" because, in the context of the toxic contamination at and emanating from the DSI Landfill, as a result of their concentration, or physical or chemical characteristics, they pose a substantial

present or potential hazard to human health or the environment when improperly treated, stored, transported, disposed of, or are otherwise managed.

84. Both of the Defendants has caused or contributed to a condition that presents or may present an imminent and substantial endangerment to health or the environment because each of the Defendants has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of “solid wastes” or “hazardous wastes” at the DSI Landfill.

85. The conditions at and emanating from the DSI Landfill constitute an imminent and substantial endangerment to human health in that they present an unreasonable risk, through releases of the Crude MCHM Wastes and Residues to air, soil, groundwater, and to the local POTW, of human exposure to substances which have already had a significant adverse impact upon the health of West Virginia residents, who upon exposure have suffered headaches, nausea, vomiting, and skin irritation. This risk is exacerbated by the fact that the epidemiological impacts of human exposure to Crude MCHM, PPH, and DiPPH have not been fully delineated and are not yet fully understood. That which is known and understood regarding these hazardous substances merely informs that they have caused and are likely to cause substantial harm to exposed individuals. The risk is further exacerbated by the fact that the DSI Landfill itself is not designed, engineered, constructed, or operated to handle or contain wastes of this toxic and hazardous nature.

86. The conditions at and emanating from the DSI Landfill constitute an imminent and substantial endangerment to the environment in that they present an unreasonable risk of releases of the Crude MCHM Wastes and Residues to environmental media—air, soil, and groundwater—either directly or through the POTW, and of contamination to those media. Once

these media are contaminated, the risk of human exposure increases dramatically, primarily through further degradation of the water supply. While direct impact upon various animal species is not yet known (the manufacturer has indicated that “no data [are] available” as to the effect that Crude MCHM will have on fish, aquatic invertebrates and aquatic plants), recent experience with human exposure suggests that such impact is likely to be seriously adverse.

87. The Defendants' liability for such relief as the Court may determine appropriate and necessary under RCRA § 7002(a)(1)(B), 42 U.S.C. § 6972(a)(1)(B), is strict, joint and several.

88. Governmental Plaintiffs are entitled to relief under RCRA § 7002(a), 42 U.S.C. § 6972(a), restraining the Defendants and requiring each of them, jointly and severally, to take such action, including a complete, timely and appropriate investigation and abatement of all actual and potential endangerments arising from the solid wastes and hazardous wastes at and emanating from the DSI Landfill, as may be necessary to abate the actual and potential endangerment at issue, and awarding the Governmental Plaintiffs by way of restitution the governmental response costs that they have incurred and will continue to incur in responding to and abating the actual and potential endangerments at and in the vicinity of the DSI Landfill, including the costs they have incurred and will incur in the future in overseeing and monitoring the response conducted by or on behalf of liable parties at and in the vicinity of the DSI Landfill.

COUNT II
GOVERNMENTAL ABATEMENT OF PUBLIC NUISANCE CONDITION
(Asserted by Both Governmental Plaintiffs Against Both Defendants)

89. Governmental Plaintiffs incorporate paragraphs 1 through 88, above, as if fully set forth herein.

90. Under West Virginia law, a public nuisance is “an act or condition that unlawfully operates to hurt or inconvenience an indefinite number of persons.” *Hark v. Mountain Fork Lumber Co.*, 127 W.Va. 586, 595-96, 34 S.E.2d 348, 354 (1945). The Restatement (Second) of Torts § 821B defines a public nuisance as “an unreasonable interference with a right common to the general public.”

91. It is the duty of the proper public entities to vindicate the rights of the public and to ensure the welfare and safety of the general population. *See Hark*, 127 W.Va. at 595-96, 34 S.E.2d at 354. Section 16-3-6 of the West Virginia Code makes it clear that the proper public entities are, in this instance, the Governmental Plaintiffs now before this Court. That section authorizes any county or municipal health officer to inquire into and investigate all nuisances affecting the public health within his jurisdiction, and as to such nuisances affecting public health, that section provides, in pertinent part, as follows:

[T]he county commission of any county or any municipality is authorized and empowered to apply to the circuit court of the county in which any such nuisance exists, or to the judge thereof in vacation, for an injunction forthwith to restrain, prevent or abate such nuisance.

West Virginia Code § 16-3-6.

92. Where a condition “is shown by facts and circumstances to constitute a nuisance affecting public health ‘no measure of necessity, usefulness or public benefit will protect it from the unflinching condemnation of the law.’” *Board of Com'rs of Ohio County v. Elm Grove Mining Co.*, 122 W.Va. 442, 9 S.E.2d 813, 817 (W.Va. 1940) (quoting 1 Wood on Nuisances, 3d Ed., § 19); *Respublica v. Caldwell*, 1 U.S. 150 (1785).

93. Under West Virginia law, the conditions at and emanating from the DSI Landfill constitute serious public nuisance adversely affecting human health in that they present an unreasonable risk, through releases of the Crude MCHM Wastes and Residues to air, soil,

groundwater, and to the local POTW, of human exposure to substances which have already had a significant adverse impact upon the health of West Virginia residents, who upon exposure have suffered headaches, nausea, vomiting, and skin irritation. This risk is exacerbated by the fact that the epidemiological impacts of human exposure to Crude MCHM, PPH, and DiPPH have not been fully delineated and are not yet fully understood. That which is known and understood regarding these hazardous substances merely informs that they have caused and are likely to cause substantial harm to exposed individuals. The risk is further exacerbated by the fact that the DSI Landfill itself is not designed, engineered, constructed, or operated to handle or contain wastes of this toxic and hazardous nature.

94. Under West Virginia law, the conditions at and emanating from the DSI Landfill constitute a serious public nuisance adversely affecting the public welfare and the environment in that they present an unreasonable risk of releases of the Crude MCHM Wastes and Residues to environmental media—air, soil, and groundwater—either directly or through the POTW, and of contamination to those media. Once these media are contaminated, the risk of human exposure increases dramatically, primarily through further degradation of the water supply. While direct impact upon various animal species is not yet known (the manufacturer has indicated that “no data [are] available” as to the effect that Crude MCHM will have on fish, aquatic invertebrates and aquatic plants), recent experience with human exposure suggests that such impact is likely to be seriously adverse.

95. Accordingly, it is incumbent upon the Governmental Plaintiffs, in full recognition of the risks posed by potential human exposure to such substances, to seek the abatement of the nuisance arising from the improper disposal of the Crude MCHM Wastes and Residues at the DSI Landfill.

96. Pursuant to Section 16-3-6 of the West Virginia Code and their inherent police powers to effect their responsibility to protect the public health, safety, welfare and the environment, Governmental Plaintiffs are entitled to an injunction forthwith compelling a remedial investigation into such nuisance and to restrain, prevent or abate such nuisance.

COUNT III
GOVERNMENTAL ABATEMENT OF A PUBLIC NUISANCE UNDER
SECTION 1135.03 OF THE HURRICANE CODE OF ORDINANCES
(Asserted By the City of Hurricane Only – Against Both Defendants)

97. Governmental Plaintiff the City of Hurricane incorporates paragraphs 1 through 96, above, as if fully set forth herein.

98. In full and lawful exercise of the plenary powers granted to it under Article VI, Sec. 39a of the Constitution of West Virginia and of the police powers enumerated in Section 8-12-2 of the West Virginia Code, the City Council for the City of Hurricane, West Virginia, enacted Article 1135, pertaining to nuisances and their abatement. Section 1135.02 of the Hurricane, West Virginia, Code of Ordinances prohibits the causing, harboring, committing or maintaining of any nuisance (as defined by the statutes or common law of the State of West Virginia or as defined within the City's ordinances) at any place within the area surrounding the City when such nuisance constitutes a hazard to the health, safety or good order of the City or its inhabitants.

99. Section 1135.03 of the Hurricane, West Virginia, Code of Ordinances enumerates, non-exclusively, certain conditions which, if occurring within the City or within one mile of its limits, constitute a nuisance, including: (a) the maintenance or placing of any substance on any public or private place, which is injurious or dangerous to the public health, safety or good order and any business, trade or activity whereby noisome stench and odors or noxious gasses arise or are generated; and (b) every act or thing which may be permitted, allowed, or continued by the

owner, agent, assignee, or occupant of any premises or property which act or thing relates to the location, construction, or maintenance of yards, lots, and other places where offensive, unsightly, unwholesome, objectionable or dangerous substances or liquids are or may be accumulated to the damage or injury of any of the inhabitants of the City.

100. Under Section 1135.03 of the Hurricane, West Virginia, Code of Ordinances, the conditions at and emanating from the DSI Landfill constitute serious public nuisance adversely affecting human health in that they present an unreasonable risk, through releases of the Crude MCHM Wastes and Residues to air, soil, groundwater, and to the local POTW, of human exposure to substances which have already had a significant adverse impact upon the health of West Virginia residents, who upon exposure have suffered headaches, nausea, vomiting, and skin irritation. This risk is exacerbated by the fact that the epidemiological impacts of human exposure to Crude MCHM, PPH, and DiPPH have not been fully delineated and are not yet fully understood. That which is known and understood regarding these hazardous substances merely informs that they have caused and are likely to cause substantial harm to exposed individuals. The risk is further exacerbated by the fact that the DSI Landfill itself is not designed, engineered, constructed, or operated to handle or contain wastes of this toxic and hazardous nature.

101. Under Section 1135.03 of the Hurricane, West Virginia, Code of Ordinances, the conditions at and emanating from the DSI Landfill constitute a serious public nuisance adversely affecting the environment in that they present an unreasonable risk of releases of the Crude MCHM Wastes and Residues to environmental media—air, soil, and groundwater—either directly or through the POTW, and of contamination to those media. Once these media are contaminated, the risk of human exposure increases dramatically, primarily through further degradation of the water supply. While direct impact upon various animal species is not yet

known (the manufacturer has indicated that “no data [are] available” as to the effect that Crude MCHM will have on fish, aquatic invertebrates and aquatic plants), recent experience with human exposure suggests that such impact is likely to be seriously adverse.

102. Section 8-12-19 of the West Virginia Statutes provides, in pertinent part, that wherever the powers and authority granted in Chapter 8 of the statutes cannot be reasonably and efficiently exercised by confining the exercise thereof within the corporate limits of a municipality, the powers and authority of the municipality shall extend beyond the corporate limits to the extent necessary to the reasonably efficient exercise of such powers and authority within the corporate limits; provided, however, that such powers and authority, unless otherwise provided in the code or elsewhere in law, shall not extend more than one mile beyond the corporate limits or into the corporate limits of another municipality without the consent of the governing body thereof.

103. Under the foregoing provisions of the City of Hurricane Municipal Code, the conditions at and emanating from the DSI Landfill constitute both a public nuisance and a nuisance affecting public health, in that toxic substances threaten to leach or leak from such landfill into the soil and groundwater surrounding such landfill, thereby endangering and adversely affecting, *inter alia*, the supply of public drinking water and, ultimately, public health and safety and the natural environment.

104. Pursuant to Section 16-3-6 of the West Virginia Code and its inherent police powers, the City of Hurricane is entitled to an injunction forthwith compelling defendants, jointly and severally, to perform a remedial investigation into such nuisance and to restrain, prevent or abate such nuisance, under the direction and supervision of the City of Hurricane.

PRAYER FOR RELIEF

WHEREFORE, the Governmental Plaintiffs respectfully request that this Honorable Court award the following relief:

A. Pursuant to 28 U.S.C. § 2201, 42 U.S.C. § 6972, and applicable state and municipal law, enter a declaratory judgment against each of the Defendants, jointly and severally, that will be binding in any subsequent action or proceeding to recover response costs or governmental abatement costs with regard to conditions at the DSI Landfill that declares each defendant liable for: (1) the costs of performing a competent, timely and complete response to the actual and potential endangerments and nuisances that are or may be presented by the MCHM Wastes at and emanating from the DSI Landfill in full compliance with the NCP; and (2) reimbursing Governmental Plaintiffs for their costs incurred and to be incurred in compliance with this Court's Orders in providing oversight and monitoring of response actions required to be undertaken at the DSI Landfill;

B. Pursuant to 42 U.S.C. § 6972 and applicable state and municipal law, enjoin each of the Defendants, jointly and severally, to undertake, in full compliance with the NCP, at their sole cost, and in compliance with the coordinated oversight and direction of the Governmental Plaintiffs', all actions necessary to investigate, abate and otherwise respond to endangerments to health or the environment or nuisances that may be presented by or associated with the MCHM Wastes that are located at, may have passed through, or threaten to become located in, at, around and in the vicinity of the DSI Landfill, specifically including (without limitation) the removal of all MCHM Waste from such landfill and the lawful treatment or disposal of such waste at another location;

C. Enter as a Final Order including corresponding Declaratory Relief, pursuant to 42 U.S.C. § 6972 and applicable state and municipal law, that provides that, in the event of the

Defendants' substantial non-compliance with this Court's Injunction directing Defendants to undertake abatement actions at the DSI Landfill, Governmental Plaintiffs may: (1) undertake, at their sole discretion, any necessary and appropriate response actions at the landfill; and (2) seek and obtain by noticed motion on a periodic basis no more often than monthly a lump sum judgment for any sums the Governmental Plaintiffs have previously incurred in performing such response obligations, which lump sum judgment shall be entered forthwith by the Clerk of the Court to be executed upon as appropriate; and

D. Award against the Defendants, jointly and severally, as restitution, Governmental Plaintiffs' costs incurred from the date the Notices of Endangerment required by RCRA § 7002, 42 U.S.C. § 6972, were provided to the Defendants, and all costs to be incurred by Governmental Plaintiffs, in investigating or responding in compliance with this Court's Orders to any endangerments and nuisances presented by the MCHM Wastes at and emanating from the DSI Landfill; and

E. Solely as to the First Count, award to Governmental Plaintiffs and against Defendants, jointly and severally, Governmental Plaintiffs' costs of litigation, including their reasonable attorney and expert witness fees and costs and other appropriate fees and costs, as authorized by 42 U.S.C. § 6972(e).

F. Retain continuing jurisdiction of this action to the extent necessary and for as long as necessary to enforce and interpret, and to review the Defendants' compliance with, this Court's orders entered herein; and

G. Grant to Governmental Plaintiffs an award of prejudgment interest, pursuant to applicable federal or state law; and

H. Grant to Governmental Plaintiffs such other and further relief as the Court deems just and appropriate.

**JENNIFER SCRAGG KARR
PUTNAM COUNTY ATTORNEY
PUTNAM COUNTY, WV**

**RONALD JAMES FLORA
HURRICANE CITY ATTORNEY
HURRICANE, WV**

BY: /s/Michael O. Callaghan
Michael O. Callaghan
Chief Assistant Putnam County Attorney
Chief Assistant Hurricane City Attorney
NEELY & CALLAGHAN
159 Summers Street
Charleston, WV 25301-2134
Telephone: (304) 343-6500
Facsimile: (304) 343-6528
E-Mail: mcallaghan@neelycallaghan.com

NEELY & CALLAGHAN

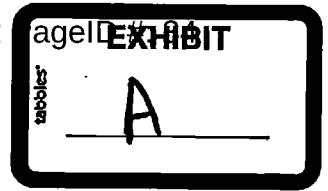
Lawyers

159 SUMMERS STREET

CHARLESTON, WEST VIRGINIA 25301-2134

304-343-6500

FAX 304-343-6528



April 25, 2014

Via Certified Mail (Return Receipt Requested)

Disposal Service, Incorporated
1001 Fannin Street
Suite 4000
Houston, TX 77002

CT Corporation System
West Virginia Registered Agent for Disposal
Service, Incorporated
5400 D Big Tyler Road
Charleston, WV 25313

Waste Management of West Virginia,
Incorporated
1001 Fannin Street
Suite 4000
Houston, Texas 77002

CT Corporation System
West Virginia Registered Agent for Waste
Management of West Virginia, Incorporated
5400 D Big Tyler Road
Charleston, WV 25313

Disposal Service, Incorporated
c/o General Manager
State Route 34
Hurricane, WV 25526

**Re: Notice of Endangerment Pursuant to Section 7002(b)(2)(A) of the Resource
Conservation and Recovery Act, 42 U.S.C. § 6972(b)(2)(A)
and**

**Notice of Intent to File Citizen Suit Pursuant to the West Virginia Hazardous
Waste Management Act, W. Va. Code § 22-18-19**

To Whom It May Concern:

Our law practice group represents the City of Hurricane, West Virginia ("City") and the County Commission of Putnam County, West Virginia ("County") (City and County collectively ""). The Governmental Plaintiffs hereby provide Disposal Service, Incorporated ("DSI"), Waste Management of West Virginia, Incorporated ("WMI") (DSI and WMI collectively "Defendants"), and their West Virginia Registered Agents with the Governmental Plaintiffs' Notice of Endangerment and intent to file a "citizen suit" pursuant to the Resource Conservation and Recovery Act ("RCRA") § 7002(a)(1)(B), 42 U.S.C. § 6972(a)(1)(B) (2014), to address Defendants' contributions to conditions that may present an imminent and substantial endangerment to health or the environment ("Notice").

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Section 7002(b)(2)(A) of RCRA requires that a plaintiff give a defendant notice prior to filing a citizen suit. 42 U.S.C. § 6972(b)(2)(A) (2014); *see also*, 40 C.F.R. § 254, *et seq.* The purpose of this waiting period is to give the parties a reasonable time to resolve the matter cooperatively. However, in cases where the alleged endangerment is respecting violations of Subtitle C of RCRA (also known as Subchapter III of RCRA), Governmental Plaintiffs may file suit immediately after providing notice of intent to do so. 42 U.S.C. § 6972(b)(2)(A)(iii) (2014).

As discussed more fully below, the alleged endangerment here arises from improper disposal of remediation residue containing commercial chemical products known by the trade names “Crude MCHM,” propylene glycol phenyl ether or “PPH,” and dipropylene glycol phenyl ether or “DiPPH.” According to relevant Material Safety Data Sheets (“MSDS”), Crude MCHM is a chemical mixture containing the commercial chemical product “methanol.” Pursuant to regulations promulgated by the U.S. Environmental Protection Agency, methanol is listed as both a “hazardous waste” under subtitle C of RCRA, 42 U.S.C. 6921 *et seq.* (*see* 40 C.F.R. § 261.33), and a “hazardous substance” under section 102(a) of the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9602(a) (*see* 40 C.F.R. § 302.4). Given that the endangerment arises from the improper disposal of a constituent that is regulated under subtitle C of RCRA, the alleged endangerment is respecting a subtitle C violation. As such, the Governmental Plaintiffs may file suit immediately after providing this Notice.

In addition, Governmental Plaintiffs hereby provide Defendants with their Notice of Intent to file a potential citizen suit in West Virginia State Court pursuant to Section 19 of the West Virginia Hazardous Waste Management Act (“WV HWMA”), W. Va. Code § 22-18-19, for violations of the WV HWMA. Section 19 states, in relevant part, “Any person may commence a civil action . . . against any person who is alleged to be in violation of any provision of this article or any condition of a permit issued or rules promulgated hereunder, except that no action may be commenced under this section prior to sixty days after the plaintiff has given notice to the appropriate enforcement . . . authority and to the person against whom the action will be commenced . . .” W. Va. Code § 22-18-19 (2014). Defendants have violated the WV HWMA by improperly disposing of remediation residue containing Crude MCHM, PPH, DiPPH, and methanol, which is a RCRA subtitle C listed hazardous waste.

INTRODUCTION:

Governmental Plaintiffs bring this action to abate a serious public nuisance condition and endangerment to human health and the environment within the City and County. Defendants own and operate the “DSI Landfill,” which is located in the City and County. Defendants improperly and unlawfully disposed of toxic substances at the DSI Landfill. The conditions created by the Defendants at the DSI Landfill are jeopardizing the public health, safety and environment of both the City and the County. The conditions are also threatening the public’s

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use and enjoyment of public and natural resources within the City and the County. All of this is to the detriment of the inhabitants and taxpayers of both the City and the County.

Governmental Plaintiffs seek relief requiring the Defendants to: (a) fund or perform, under the oversight and supervision of Governmental Plaintiffs', a remedial investigation and abatement of the actual and potential endangerments described herein in full compliance with the National Oil and Hazardous Substances Pollution Contingency Plan ("NCP"), 40 C.F.R., Part 300, pursuant to RCRA § 7002(a)(1)(B), 42 U.S.C. § 6972(a)(1)(B); (b) abate the public nuisance described herein, in full compliance with the NCP, pursuant to state and federal law; and (c) reimburse Governmental Plaintiffs for their reasonable litigation costs, including reasonable attorneys' fees and expert witness fees and costs incurred and to be incurred in this action pursuant to RCRA § 7002(e), 42 U.S.C. § 6972(e).

DISCUSSION:

The Release of Toxic Chemicals from the Freedom Property

On or about January 9, 2014, a large quantity of toxic chemicals publicly estimated to be in the range of ten thousand (10,000) gallons was spilled from an aboveground storage tank located on property owned and/or operated by Freedom Industries, Inc., in Charleston, Kanawha County, West Virginia, immediately adjacent to and bordered by the Elk River ("the Freedom Property"). The aboveground storage tank contained, and the spilled material consisted of, Crude MCHM, PPH, and DiPPH.

As discussed above, relevant MSDS sheets for Crude MCHM reflect that it contains the commercial chemical product "methanol" (assigned number 67-56-1 by the Chemical Abstracts Service division of the American Chemical Society). Again, pursuant to regulations promulgated by the U.S. Environmental Protection Agency, methanol is listed as both a "hazardous waste" under subtitle C of RCRA, 42 U.S.C. 6921 *et seq.* (see 40 C.F.R. § 261.33), and a "hazardous substance" under section 102(a) of the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9602(a) (see 40 C.F.R. § 302.4). As discussed below, Crude MCHM, PPH, and DiPPH are toxic chemicals that are harmful to human health, though the extent to which they are harmful is not fully appreciated.

An estimated 10,000 gallons of the toxic mixture spilled from the Freedom Property reached the Elk River. The toxic mixture entered the Elk River approximately 1.5 miles upstream of the public water system intake for West Virginia American Water Company ("WVAW"). WVAW is the supplier of potable drinking water to hundreds of thousands of customers in northwest West Virginia. The toxic mixture entered the WVAW facility, resulting in the distribution of contaminated water to consumers. As a consequence of this spill,

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approximately 300,000 residents within nine (9) counties were quickly without potable water for drinking, bathing, and cooking.

Individuals in the vicinity of the spill at the Freedom Property and individuals receiving tainted water in their homes and at their places of work complained of a noxious licorice-like odor, nausea, and vomiting. According to the West Virginia Department of Health and Human Resources ("WV DHHR"), at least 26 people were admitted to area hospitals and 533 treated and released at those facilities for symptoms related to MCHM exposure. The Executive Director of the WV DHHR recently stated that "Those [numbers] are probably gross underestimates of the true public health impacts."

According to recent estimates by the West Virginia Testing Assessment Program ("WV TAP") (as discussed more fully below, assembled by the West Virginia Bureau for Public Health to investigate impacts of the MCHM releases to the Elk River) over 100,000 people experienced skin reactions, eye irritation, nausea or other ailments after exposure to MCHM. On or about January 9, 2014, WVAW announced publicly that water which it had distributed and which was intended for potable consumption from its facility in Charleston had become contaminated by the spill from the Freedom Property.

On the same date, West Virginia Governor Earl Ray Tomblin, recognizing a clear endangerment to human health, declared a State of Emergency for the nine West Virginia counties in which consumers of WVAW were located (Kanawha, Putnam, Cabell, Boone, Clay, Jackson, Logan, Lincoln, and Roane), and residents of the affected area were advised not to drink, bathe, or wash with water from WVAW. On or about January 10, 2014, the President of the United States declared a federal emergency for the affected areas of West Virginia in response to the spill event.

Although in late January the State of West Virginia eventually advised the public that consumption of water distributed by WVAW could resume, the U.S. Centers for Disease Control and Prevention ("CDC") advised that pregnant women should not consume it. Due to the uncertainty and lack of information regarding the health and environmental consequences of exposures to Crude MCHM and PPH, CDC reported "screening levels" of 1 ppm for Crude MCHM and 1.2 ppm for PPH. Thereafter, Governor Tomblin established a safe drinking water maximum contaminant level at 10 parts per billion ("ppb") for Crude MCHM. It was not until February 28, 2014 that the Governor of West Virginia lifted the State of Emergency declaration. On or about March 3, 2014, CDC advised that pregnant women could resume drinking water distributed by WVAW.

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The Hazardous and Toxic Nature of the Spilled Contaminants

The State's Efforts to Evaluate the Contaminants

Again, the West Virginia Bureau for Public Health established the WV TAP in February 2014 to initiate an in-depth analysis to determine the odor threshold for Crude MCHM, to begin assessing tap water in homes in the affected areas, and to establish a panel of independent experts to evaluate the safety factor for the chemicals spilled from the Freedom Property. On or about March 17, 2014, WV TAP released a report entitled "Health Effects for Chemicals in 2014 West Virginia Chemical Release: Crude MCHM Compounds, PPH and DiPPH," stating that "the exact chemical composition of the spilled liquid" from the Freedom Property "remains somewhat undefined" and that the "exact composition" of the chemicals "has not been chemically confirmed."

WV TAP explained in its report that Crude MCHM contains a mixture of six organic compounds, MCHM, MMCHM, MMCHC, DMCHDC, CHDM and Methanol, but that it has been reported by Freedom Industries that in addition to Crude MCHM, the leaked liquid also contained PPH and DiPPH. WV TAP's report explained that "[v]ery limited toxicological data has been reported for Crude MCHM or pure MCHM[.]" WV TAP reported that the United States Environmental Protection Agency has developed a national system providing toxicity information to the public but that it lists absolutely no toxicology data for Crude MCHM, MCHM, MMCHM, MMCHC, PPH, DiPPH and Polypropylene glycol phenyl ether. WV TAP noted that the USEPA list of maximum contaminant levels for drinking water does not include any level with regard to the known chemical ingredients of Crude MCHM or PPH.

WV TAP also issued a "Technical Memorandum" on a short study conducted regarding the odor threshold concentration and recognition level of people with regard to Crude MCHM in water. The study indicated that humans could detect the odor of Crude MCHM when it was lower than analytical reports could detect. Further, the study indicated that because of the odor, people objected to consuming the water.

The Manufacturer Has Acknowledged the Hazardous Nature of the Contaminants

Eastman Chemical Company ("Eastman"), the manufacturer and supplier of Crude MCHM, formally advises with regard to Crude MCHM: "Avoid release to the environment." Eastman also advises that the method for containment and cleaning up of MCHM is to "[a]bsorb the spill with vermiculite or other inert material, then place in a container for chemical waste." For large spillages, Eastman advises "Flush spill area with water spray, Prevent runoff from entering drains, sewers, or streams, Dike for later disposal". The manufacturer's recommended disposal method for Crude MCHM is incineration. The relevant MSDS from Eastman instructs as follows: "Mix with compatible chemical which is less flammable and incinerate." As to the

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toxicity of Crude MCHM to fish, aquatic invertebrates and aquatic plants, Eastman reports that there are "[n]o data available."

The Crude MCHM Waste and Residue Are Both a "Hazardous Waste" Under
Applicable Statutes and Regulations, Including Those Issued Under
RCRA Subtitle C, and a "Hazardous Substance" Under CERCLA

RCRA was enacted by Congress in 1976, as an amendment to the 1965 Solid Waste Disposal Act. Subtitle C of RCRA establishes a national, comprehensive "cradle to grave" management system for substances determined to be hazardous wastes, regulating, *inter alia*, the manner in which such wastes can be treated, stored, and disposed of. *See* 42 U.S.C. §§ 6921-6934. Under RCRA § 3006(b), 42 U.S.C. § 6926(b), a state may develop its own hazardous waste program and, following notice and an opportunity for public hearing, apply for and obtain U.S. EPA approval for such program to operate in lieu of the federal program within such state, subject to certain federal requirements, the most notable of which is that the state program must be equivalent to and consistent with the federal RCRA Subtitle C hazardous waste management program. *See* 42 U.S.C. § 6926(b). West Virginia's hazardous waste program, which is substantially similar to the federal program, has been formally approved by the Administrator of the U.S. Environmental Protection Agency and, accordingly, operates "in lieu of" the federal RCRA program within the State of West Virginia.

The WV HWMA defines the term "hazardous waste" in a manner that is virtually identical to the Congressional definition set forth in RCRA § 1004(5), 42 U.S.C. § 9604(5). The WV HWMA defines the term "hazardous waste" to mean:

[A] waste or combination of wastes, which because of its quantity, concentration or physical, chemical or infectious characteristics, **may**:

(A) Cause, or significantly contribute to, an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness; **or**

(B) pose a substantial present or **potential hazard** to human health or the environment when improperly treated, stored, transported, disposed of or otherwise managed.

West Virginia Code § 22-18-3(6) (emphasis added).

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As a consequence of its recognized toxicity and its patently hazardous nature as to human health and the environment, Crude MCHM and the MCHM wastes and residues plainly meet the foregoing statutory definition and are hazardous wastes. Section 22-18-6 of the West Virginia Code provides that the Director of the West Virginia Department of Environmental Protection ("WV DEP") is responsible for promulgating, in consultation with other state agencies, rules establishing criteria for identifying the characteristics of hazardous waste, identifying the characteristics of hazardous waste and listing particular hazardous wastes which are subject to the provisions [of the WV HWMA]. West Virginia Code § 22-18-6(a)(2).

To accomplish this objective, the Director adopted and incorporated, with certain exceptions, applicable federal regulations from Subtitle C of RCRA pertinent to the listing and identification of hazardous wastes subject to the state's regulatory program. *See* West Virginia Code of State Regulations § 33-20-3 (adopting and incorporating the hazardous waste identification and listing regulations of 40 C.F.R. Part 261, with certain modifications, exceptions and additions).

Included within the federal regulations adopted and incorporated into the West Virginia hazardous waste management program is the designation of the commercial chemical product "methanol", a key component of the "Crude MCHM" mixture, as a "listed" regulatory hazardous waste under 40 C.F.R. § 261.33 and its West Virginia counterpart, when that commercial chemical product is discarded (specifically including spilled or leaked) or intended to be discarded.

Both the federal RCRA Subtitle C program and the West Virginia hazardous waste management program provide for the identification of regulatory hazardous wastes by characteristic, including the characteristic of toxicity, which is determined by application of a designated testing protocol set forth in 40 C.F.R. § 261.24 (adopted by reference into the West Virginia hazardous waste management program by Section 33-20-3 of the West Virginia Code of State Regulations).

With certain exceptions not herein applicable, 40 C.F.R. § 261.24 provides that a waste exhibits the characteristic of toxicity and is thus a "hazardous waste listed and identified by the Administrator" under RCRA Subtitle C, and a regulated Hazardous Waste under the WV HWMA if (using the Toxicity Characteristic Leaching Procedure, test Method 1311 in "Test Methods for Evaluating Solid Waste, Physical/Chemical Methods," EPA Publication SW-846) the extract from a representative sample of the waste contains any of the contaminants listed in the table in that section at the concentration equal to or greater than the respective value given in that table.

In the case of organic chemicals (like MCMH), each of the section 261.24 toxicity table values was derived from a known toxicity level, deemed acceptable under another regulatory

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scheme, typically the federal Safe Drinking Water Act ("SDWA"). *See* 55 FR 11798 (March 29, 1990). While RCRA is Congress's effort to address land pollution through the regulation of solid and hazardous wastes, the SDWA contains Congress's strict and enforceable "end-of-the drinking water pipe" standards for the nation's public drinking water supply. The SDWA accomplishes this goal by setting safe contaminant concentration values—known as maximum contaminant levels or "MCLs"—for contaminants known to pose health risks when present in drinking water.

To derive the 40 CFR § 261.24 toxicity table values (which set toxicity thresholds for RCRA regulatory hazardous waste determinations), U.S. EPA multiplies the relevant toxicity value (typically the MCL under SDWA) for an organic chemical by a dilution/attenuation factor ("DAF"), which is typically 100 for allowable drinking water levels. *See* 55 FR 11798 (the DAF "estimates the dilution and attenuation of the toxic constituents in a waste as they travel through the subsurface from the point of leachate generation (i.e., the landfill) to the point of human or environmental exposure.") Thus, for each MCL set pursuant to SDWA to protect against health threat in a public water supply, a corresponding TCLP value has been derived as a product of the MCL and the DAF for purposes of protecting the nation's groundwater from those same health threats via leachate from a landfill or land disposal unit.

Although no MCL has been set under the SDWA for either "Crude MCHM" or PPH, the Governor of West Virginia, exercising emergency executive authority, set an emergency screening level and a provisional MCL of 10 parts per billion (10 ppb) for MCHM in the state's drinking water. Accordingly, *for MCHM*, a corresponding emergency or provisional TCLP threshold of 1 part per million (1 ppm) should also be recognized for the purpose of determining whether a substance that is a waste under the West Virginia Hazardous Waste Regulations is a hazardous waste for the purposes of those same regulations, at least in the context of this State & Federal Emergency until U.S. EPA or the WV Department of Environmental Protection establishes a different standard through the rule-making process.

On information and belief, the Crude MCHM Wastes and Residues which Defendants accepted and disposed of at the DSI Landfill in Hurricane, West Virginia, contained MCHM at concentrations well in excess of 1 ppm. Accordingly, the Crude MCHM Wastes and Residues are and should be considered hazardous wastes, both in the context of the statutory definitions outlined above and in the context of the "listed and identified" hazardous wastes subject to the applicable state and federal regulatory schemes.

The federal Comprehensive Environmental Response, Compensation & Liability Act ("CERCLA" or "federal Superfund Act") (42 U.S.C. § 9601-- 9675) provides a comprehensive mechanism and a statutory and regulatory framework to direct governmental entities and private parties responding to the release of hazardous substances into the environment and provides guidance, cleanup criteria, and controls for such remedial activities. In Section 102(a) of

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CERCLA”), 42 U.S.C. § 9602(a), Congress directed the Administrator of the U.S. Environmental Protection Agency to designate “as hazardous substances . . . such elements, compounds, mixtures, solutions, and substances which, when released into the environment may present substantial danger to the public health or welfare or the environment.” 42 U.S.C. § 9602(a). The Administrator’s designations are set forth at 40 C.F.R. § 302.4, in which the substance “methanol” is listed. As noted above, methanol is a component of Crude MCHM.

Federal courts have recognized that where a waste material contains a hazardous substance, like methanol, then that waste material is itself a hazardous substance for the purposes of CERCLA. *See, e.g., United States v. Carolawn*, 21 Env’t Rep. Cases 2124, 2126 (D.S.C. 1984). Accordingly, the Crude MCHM waste from the Freedom Property—a substance which contains a CERCLA hazardous substance—is undeniably a CERCLA hazardous substance itself, and funds could be made available from the West Virginia Hazardous Waste Emergency Response Fund (W. Va. Code Art. 22-19) to address the release of such a substance.

Notwithstanding the Patently Hazardous Nature of the MCHM Wastes and Residues and the Recognized Endangerments Associated with Human Exposure to Such Wastes and Residues, Spill Wastes and Residues Containing Crude MCHM, PPH, and DiPPH, Were Disposed of at the DSI Landfill, Without Governmental Plaintiffs’ Knowledge or Consent

Beginning in January 2014, cleanup efforts were undertaken to remove both spilled/discarded Crude MCHM and soil and groundwater that had been contaminated with Crude MCHM, PPH and DiPPH (hereinafter collectively, “Crude MCHM Waste and Residue”) from the Freedom Property. On information and belief, the Crude MCHM Waste and Residue were removed from the Freedom Property and taken offsite to an interim location, where such wastes were stored for some period of time.

On or about March 12, 2014, the City and the County learned of and received complaints from residents of a powerful and noxious odor, emanating from the DSI Landfill. The odor reports that Governmental Plaintiffs received were consistent with odors reported by individuals in the vicinity of the Freedom Property following the January 2014 spill and odors reported by those who had received tainted potable water from WVAW during the same period. Through their investigation of the complaints from the public concerning the odor, both Governmental Plaintiffs discovered that Crude MCHM Waste and Residue from the Freedom Property and spill site was being transported from an off-site storage location through Putnam County and the City of Hurricane to DSI’s solid waste landfill.

Defendants never notified either Plaintiff or the general public of their intent to accept MCHM Waste at the DSI Landfill. Nor did Defendants provide any public notice or opportunity to comment as to their application to the WV DEP to modify their operating permit to allow

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acceptance of Crude MCHM Waste and Residue. DSI and WMI have admitted that they have accepted at least nine (9) truckloads of MCHM Waste, including "cleanup water" tainted with Crude MCHM, for disposal at the DSI Landfill. DSI and WMI admitted that eight of the at least nine truckloads arrived at the DSI Landfill in liquid form, were placed into a concrete-lined pit, and was then "solidified" by mixing it with sawdust by use of a backhoe. The other truckload arrived at the landfill in an already "solidified" form, having been treated by a third party in an undetermined manner. According to DSI and WMI this toxic "solidified" mixture was then "mixed in with the general waste mass at various locations of the landfill."

DSI and WMI have also admitted that efforts were made to dilute the Crude MCHM Waste and Residue in an effort to abate or mitigate its toxic effects. The DSI solid waste landfill is open to the environmental elements. It rains in Putnam County, and such rain often mixes with landfill contents. There are other various liquids in a landfill that will mix with solidified substances in the landfill. The leachate collected from DSI's landfill eventually makes its way via a leachate collection system to the wastewater treatment facility of the City. Eventually, the wastewater at the City's Publicly Owned Treatment Works ("POTW" or "wastewater treatment facility") is discharged into Hurricane Creek, a stream of the State of West Virginia.

On information and belief, the MCHM Wastes and Residue which Defendants accepted and disposed of at the DSI landfill in the City contained MCHM at concentrations well in excess of 1 ppm. Accordingly, for the purposes of West Virginia hazardous waste regulation, the Crude MCHM Waste and Residue were, in the context of the Declared Public Emergency during which those wastes were generated, necessarily a provisional hazardous waste regulated pursuant to Article 22-11 of the West Virginia Code, and should have been treated, stored, and disposed of in a manner required as to all hazardous wastes regulated under Article 22-18 of the West Virginia Code.

The DSI Landfill is not a facility which was designed, engineered, or constructed to accept RCRA Subtitle C hazardous wastes or toxic wastes such as the Crude MCHM Waste and Residue for disposal. On information and belief, the Defendant owners and operators of the DSI Landfill have not satisfied any of the conditions necessary for the DSI Landfill to become licensed to accept any RCRA Subtitle C hazardous waste. The DSI Landfill is, at a minimum, poorly suited as a disposal site for hazardous and toxic waste materials, including the MCHM Wastes and Residues, and the decision to place such wastes into that landfill was grossly ill-considered, at best.

The cleanup and removal of MCHM Wastes and Residues from the Freedom Property and spill site was intended as a "remedy," within the meaning of Section 101(25) of CERCLA, 42 U.S.C. § 9601(25), since such activities involved the cleanup of a CERCLA hazardous substance. Congress, however, has directed that the offsite transport and disposal of hazardous substances or contaminated materials without treatment to permanently and significantly reduce

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the volume, toxicity or mobility of the hazardous substances should be the least favored alternative remedial action where practicable treatment technologies are available. *See* 42 U.S.C. § 9621(b). Stated differently, Congress plainly recognized that transporting untreated hazardous substances for placement into a landfill is to be avoided, unless there are no other alternatives. (This would be particularly true where a landfill in question is not designed, engineered, or licensed to accept toxic or hazardous wastes.)

The conditions at an emanating from the DSI Landfill constitute both an imminent and substantial endangerment and a nuisance affecting public health, in that the MCHM Wastes and Residues—toxic substances as to which the full epidemiologic effects are not yet understood—have entered or threaten to enter the environment by leaching or leaking from such landfill, which was not designed, engineered, constructed, or operated to handle or contain hazardous wastes, into the soil and groundwater surrounding such landfill, thereby endangering and adversely affecting, *inter alia*, the environment, the public water supply and, ultimately, public health and safety.

PERSONS GIVING NOTICE:

The full name, address and telephone number of the persons giving notice to the Defendants under this Notice is as follows:

City of Hurricane, West Virginia
3255 Teays Valley Road
Hurricane, West Virginia 25526
Telephone: (304) 562-5896

County Commission of Putman County, West Virginia
3389 Winfield Rd #2
Winfield, West Virginia 25213
Telephone: (304) 586-0201

The Governmental Plaintiffs, however, should be contacted through their undersigned counsel with respect to this Notice at the following address and telephone number:

Michael O. Callaghan, Esq.
Law Offices of Neely & Callaghan
159 Summers Street
Charleston, West Virginia 25301
Telephone: (304) 343-6500
E-mail: mcallaghan@neelycallaghan.com

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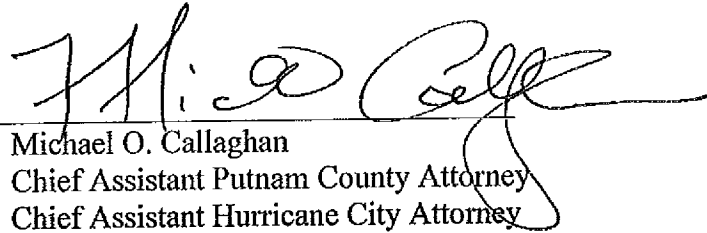
If you would like to discuss this Notice, please contact the above-referenced counsel for the Governmental Plaintiffs with respect to this Notice at the address and telephone number listed above.

Sincerely,

JENNIFER SCRAGG KARR
PUTNAM COUNTY ATTORNEY
PUTNAM COUNTY, WV

RONALD JAMES FLORA
HURRICANE CITY ATTORNEY
HURRICANE, WV

BY:



Michael O. Callaghan
Chief Assistant Putnam County Attorney
Chief Assistant Hurricane City Attorney
NEELEY AND CALLAGHAN
159 Summers Street
Charleston, WV 25301-2134
Telephone: (304) 343-6500
Facsimile: (304) 343-6528
E-Mail: mcallaghan@neelycallaghan.com

cc: Gina McCarthy, Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

Shawn M. Garvin, Regional Administrator
U.S. Environmental Protection Agency, Region 3
1650 Arch Street
Philadelphia, PA 19103

Randy C. Huffman, Cabinet Secretary
West Virginia Department of Environmental Protection
601 57th Street SE
Charleston, WV 25304

Scott Mandirola, Director
Division of Water and Waste Management
West Virginia Department of Environmental Protection
601 57th Street SE
Charleston, WV 25304

Elk River Chemical Spill Health Effects
Findings of Emergency Department Record Review
April 2014

**Collaborative Investigation by the West Virginia Bureau for Public
Health (WVBPH) and the Agency for Toxic Substances Disease Registry
(ATSDR)**

Background

On January 9, 2014, approximately 10,000 gallons of 4-methylcyclohexanemethanol (MCHM) leaked into the Elk River 1 ½ miles upstream from the water intake for West Virginia American Water (WVAW) in Charleston, West Virginia. WVAW supplies water to about 300,000 people living in 100,000 households in 9 counties in West Virginia.

At 6 PM on January 9, WVAW issued a 'do not use' order. West Virginia Poison Center started receiving phone calls from people reporting rashes, nausea, vomiting, diarrhea, and other symptoms. Emergency Departments (EDs) started seeing an increase in visits, and the WVBPH began counting the number of ED visits on January 10.

MCHM is a chemical that can form bubbles like soap to help separate coal from other rocks and minerals. This process reduces air pollution caused by burning coal. Few studies on MCHM exist and most have been conducted on animals. MCHM has been tested on rats and guinea pigs. Exposure to liquid MCHM can cause skin and eye irritation, vomiting, and diarrhea. MCHM vapors in the air can also irritate the eyes, nose, throat, and lungs. When laboratory animals are exposed at high doses, MCHM has been shown to cause problems with the liver, kidneys, blood, and the brain.

On January 21, 2014, state officials learned that another material was part of the chemical release that occurred on January 9, 2014. A smaller amount (7% by volume) of a second chemical -- propylene glycol phenyl ether (PPH) -- was in the same tank and entered the water system at the same time as the MCHM. Health effects of PPH are similar to those caused by MCHM.

Public Health Officials at WVBPH wanted to understand why people were going to the ED and whether any of the illness reported was serious. WVBPH asked epidemiologists at Agency for Toxic Substances and Disease Registry (ATSDR) to help with the investigation. An epidemiologist is a public health scientist who tries to understand how and why illness occurs so illness can be stopped.

How the investigation was done

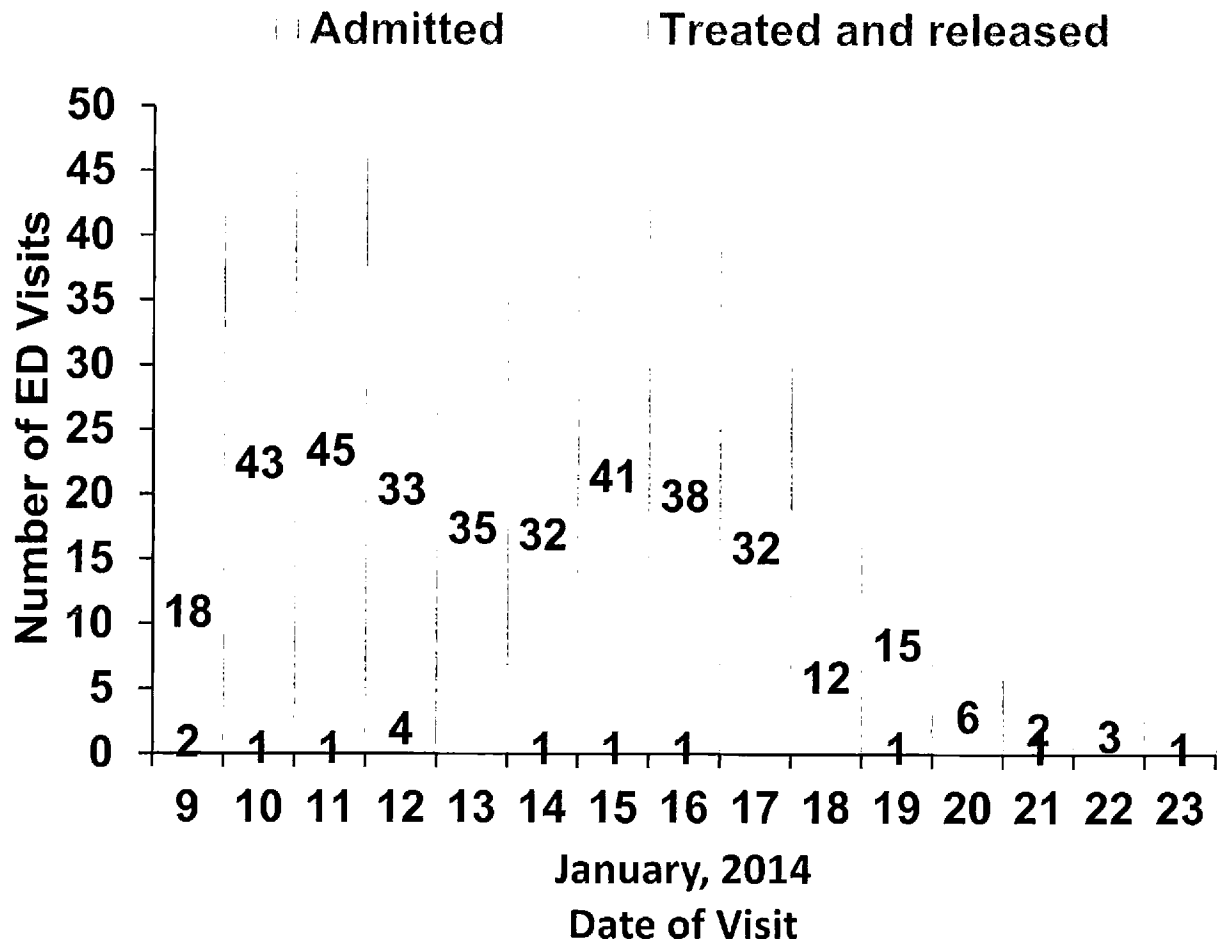
Epidemiologists from WVBPH and ATSDR put together a list of public health questions they wanted to answer. They wanted to know the kinds of symptoms people had and how they were exposed to the water. They also wanted to know what kind of treatment patients received and whether they had to be hospitalized. Epidemiologists listed all these questions on a form.

Hospitals were asked to release records for people who went to the ED between January 9 and 23, 2014, and reported illness related to the chemical spill. A total of 584 records were released to WVBPH for review. Using the form that included the public health questions, teams of WVBPH and ATSDR epidemiologists and nurses looked through each record to find answers to the questions.

What the investigation found:

- 369 records were included in the final analysis; these records were for patients who had symptoms and reported they were exposed to the water
- 215 records were *not* included in the final analysis because:
 - o 41 people left the ED without being seen by a physician
 - o 110 ED records did not record exposure to the contaminated water
 - o 45 persons were given a diagnosis (e.g., influenza, strep throat, scabies, shingles, etc.) that was considered a more likely explanation for their illness
 - o 3 persons had no symptoms of illness recorded in the record
 - o 16 persons were duplicates, visiting the ED for the second or third time
- The number of ED visits went down during the second week after the chemical spill. In the graph below, the date of visit is shown on the 'X' axis along the bottom of the graph. The number of visits is shown on the 'Y' axis along the left side of the graph. Persons admitted to the hospital are shown in blue and persons treated and released are shown in pink.

Emergency Department Visits Associated with Elk River Chemical Spill, West Virginia, 2014



- 13 (3.5%) of 369 persons were hospitalized. People who were admitted had chronic illnesses such as kidney, liver or lung disease.
- 356 (96.5%) of 369 persons were treated in the ED and released. Some treatments included IV fluids and/or medications for nausea or itching.
- The most common way people were exposed to the water was bathing, showering, washing hands, or other skin contact. (See Table 1.)

**Table 1: Exposures to Water Reported by ED Patients,
Elk River Chemical Spill, Charleston, West Virginia,
January 2014**

Route*	Number	(%)
Bathing, showering, other skin contact	194	(52.6)
Eating, drinking, swallowing	162	(43.9)
Breathing mist or vapor	54	(14.6)

*Patients could have more than one route of exposure recorded in the ED record.

- The most common symptoms reported were nausea, rash, vomiting, abdominal pain, and diarrhea. (See Table 2.)

Table 2: Most Commonly Reported Symptoms in ED Patients, Elk River Chemical Spill, Charleston, West Virginia, January 2014

Symptom*	Number	(%)
Nausea	141	(37.9)
Rash	105	(28.5)
Vomiting	104	(28.2)
Abdominal pain	90	(24.4)
Diarrhea	90	(24.4)
Headache	81	(21.9)
Itching	73	(19.8)
Sore throat	55	(14.9)
Eye pain	54	(14.6)
Cough	47	(12.7)

* Patients could have more than one symptom

- Results of laboratory tests done in the ED did not indicate any people had new kidney or liver damage.
- People who reported that they swallowed contaminated water or food were more likely to report gastrointestinal symptoms such as nausea, vomiting, and diarrhea. People who reported skin contact with contaminated water were more likely to report redness or itching of the skin.

What does this information mean?

- Symptoms associated with exposure to low levels of MCHM in this public water system appeared to be mild and resolved with no or minimal treatment, such as IV fluids after episodes of vomiting or diarrhea and/or medications to relieve nausea or itching.
- Most people who reported illness associated with the Elk River chemical spill were treated for their symptoms and released.
- Common symptoms included nausea, vomiting, diarrhea, skin rash, itching, headache, sore throat, and cough.
- These symptoms are consistent with known health effects of MCHM and with data reported by West Virginia Poison Center. It was possible that the symptoms reported to be caused by exposure to MCHM could have been caused by other mild clinical illness such as colds or flu or other viral infections.
- There are no laboratory tests or combination of signs and symptoms that can reliably distinguish mild illness caused by exposure to MCHM from mild illness.
- These data cannot 'prove' that MCHM caused the reported symptoms; however, these data are consistent with what is known about MCHM from animal studies.

Next Steps

- WVBPH collaborated with the Centers for Disease Control and Prevention (CDC) on a household survey known as a 'Community Assessment for Public Health Emergency Response' (CASPER) to measure the health, economic, and other impact of this incident on the community as a whole. The CASPER was conducted April 8-10, 2014, and findings will be released after analysis is complete. The number of persons seen in the ED (369) is a small proportion (0.12%) of the estimated 300,000 persons affected by the chemical spill. This household survey will be helpful in expanding the understanding of the impact on the entire population.
- WVBPH epidemiologists will use the information from the ED medical record review and the CASPER to make recommendations to strengthen emergency response in the future.
- Epidemiologists will continue to evaluate this data and finalize a scientific paper. Writing and talking about scientific findings will help everyone better understand all the issues surrounding this investigation.

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

I. (a) PLAINTIFFS

City of Hurricane, West Virginia; and The County Commission of Putnam County, West Virginia

DEFENDANTS

Disposal Service, Incorporated and Waste Management of West Virginia, Incorporated

(b) County of Residence of First Listed Plaintiff Putnam
(EXCEPT IN U.S. PLAINTIFF CASES)

County of Residence of First Listed Defendant Putnam
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

(c) Attorneys (Firm Name, Address, and Telephone Number)
Michael O. Callaghan - Neely & Callaghan
159 Summers Street, Charleston, WV 25301
304-343-6500

Attorneys (If Known)

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- ☐ 1 U.S. Government Plaintiff
- ☒ 3 Federal Question (U.S. Government Not a Party)
- ☐ 2 U.S. Government Defendant
- ☐ 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- | | PTF | DEF | | PTF | DEF |
|---|---------------------------------------|---------------------------------------|---|----------------------------|----------------------------|
| Citizen of This State | <input checked="" type="checkbox"/> 1 | <input checked="" type="checkbox"/> 1 | Incorporated or Principal Place of Business In This State | <input type="checkbox"/> 4 | <input type="checkbox"/> 4 |
| Citizen of Another State | <input type="checkbox"/> 2 | <input type="checkbox"/> 2 | Incorporated and Principal Place of Business In Another State | <input type="checkbox"/> 5 | <input type="checkbox"/> 5 |
| Citizen or Subject of a Foreign Country | <input type="checkbox"/> 3 | <input type="checkbox"/> 3 | Foreign Nation | <input type="checkbox"/> 6 | <input type="checkbox"/> 6 |

IV. NATURE OF SUIT (Place an "X" in One Box Only)

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES	
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excludes Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	PERSONAL INJURY <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury <input type="checkbox"/> 362 Personal Injury - Medical Malpractice	PERSONAL INJURY <input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 367 Health Care/Pharmaceutical Personal Injury Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability PERSONAL PROPERTY <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 690 Other LABOR <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Management Relations <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 751 Family and Medical Leave Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Employee Retirement Income Security Act IMMIGRATION <input type="checkbox"/> 462 Naturalization Application <input type="checkbox"/> 465 Other Immigration Actions	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 PROPERTY RIGHTS <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark SOCIAL SECURITY <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g)) FEDERAL TAX SUITS <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609	<input type="checkbox"/> 375 False Claims Act <input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input checked="" type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 896 Arbitration <input type="checkbox"/> 899 Administrative Procedure Act/Review or Appeal of Agency Decision <input type="checkbox"/> 950 Constitutionality of State Statutes
REAL PROPERTY <input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	CIVIL RIGHTS <input type="checkbox"/> 440 Other Civil Rights <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 445 Amer. w/Disabilities - Employment <input type="checkbox"/> 446 Amer. w/Disabilities - Other <input type="checkbox"/> 448 Education	PRISONER PETITIONS Habeas Corpus: <input type="checkbox"/> 463 Alien Detainee <input type="checkbox"/> 510 Motions to Vacate Sentence <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty Other: <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition <input type="checkbox"/> 560 Civil Detainee - Conditions of Confinement			

V. ORIGIN (Place an "X" in One Box Only)

- ☒ 1 Original Proceeding ☐ 2 Removed from State Court ☐ 3 Remanded from Appellate Court ☐ 4 Reinstated or Reopened ☐ 5 Transferred from Another District (specify) ☐ 6 Multidistrict Litigation

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):
42 U.S.C. §§ 6901-6922k

Brief description of cause:
Illegal storage of hazardous waste

VII. REQUESTED IN COMPLAINT:

☐ CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P.

DEMAND \$

CHECK YES only if demanded in complaint:
JURY DEMAND: ☐ Yes ☒ No

VIII. RELATED CASE(S) IF ANY

(See instructions):

JUDGE

DOCKET NUMBER

DATE 5/5/14 SIGNATURE OF ATTORNEY OF RECORD Michael O. Callaghan

FOR OFFICE USE ONLY

RECEIPT # _____ AMOUNT _____ APPLYING IFP _____ JUDGE _____ MAG. JUDGE _____